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348

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CLARA L. WASHINGTON,

Petitioner,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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PETITION

To the Honorable Supreme Court:

REFERENCE TO OPINION BELOW

The opinion of the Court of Civil Appeals, 14th Supreme Judicial District is reported in 436 S.W. 2d 554. The Supreme Court of Texas refused the application for writ of error, without opinion. A copy of the opinion of the Court of Civil Appeals is printed in Appendix A.

JURISDICTION

The date of the judgment of the Supreme Court of Texas sought to be reviewed is March 19, 1969, and the time of its entry was during that day.

Petitioner's motion for rehearing of application for writ of error was overruled on April 16, 1969. The statutory provisions believed to confer on this Court jurisdiction to

review the judgment in question by writ of certiorari is 28 U.S.C., section 1257(3) and 2101(c).

QUESTION PRESENTED

Is fair administration of justice by state courts required by the due process of law clause, and the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is Section 1, Amendment XIV, of the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner, Clara L. Washington, filed in the District Court of Harris County, a petition for bill of review of a summary judgment rendered on February 24, 1966 by the trial court in a suit on a life insurance policy. Suit for bill of review was filed on January 29, 1968, and on April 30, 1968, respondent, Golden State Mutual Life Insurance Company, filed motion for summary judgment. The trial court granted Respondent's motion for summary judgment on June 30, 1968, and denied Petitioner any and all relief.

The stage in the proceedings in the court of first instance at which, and the manner in which, the federal question

sought to be reviewed were raised, and the manner in which they were passed upon by the court were as follows:

1. By exceptions to the orders of the district court directing the district clerk not to issue the requested commissions to take depositions. (Tr. 34; Tr. 35; Tr. 36). The Court of Civil Appeals upheld the order of the district court. By Third assignment of error in appellant's motion for rehearing in court of civil appeals. Court of Civil Appeals overruled appellant's motion for rehearing. By point of error, Third Point, in application for writ of error to Supreme Court of Texas, which application was refused, no reversible error. By third ground, in motion for rehearing, which was overruled by the Supreme Court of Texas.

2. In motion for new trial, fourth ground; (Tr. 58, 59) the court erred in not setting aside its judgment rendered on the 31st day of January, 1966, granting to the defendant in case No. 651,730, a summary judgment on only nine (9) days notice to the plaintiff and the adverse party, instead of ten (10) days notice as is required by Rule 166-A, of the T.R.C.P., for such judgment was void, and in violation of due process of law and equal protection of the laws, under Sec. 1, 14th Amendment to the U. S. Constiution. The trial court overruled the motion for new trial. By point of error, Fourth point, in brief of appellant in court of civil appeals, which court affirmed the judgment of the trial court. By assignment of error, Fourth assignment, in motion for rehearing in Court of Civil Appeals, which court overruled such motion. By point of error, Fourth point, in application for writ of error in Supreme Court of Texas, which application was refused, No reversible error. By fourth ground, in motion for rehearing, which was overruled by the Supreme Court of Texas.

REASONS FOR GRANTING THE WRIT

A State court has decided a federal constitutional question of substance, either not determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

The federal constitutional question is of importance in the administration of justice.

1. The court of civil appeals stated in its opinion, 436 S.W. 2d 556, "It is not the purpose of a bill of review to relitigate issues decided in a former case whether the court committed error or not unless the prior judgment can be said to be void. We hold that the prior judgment was not void."

Section 1, of Amendment XIV, to the Constitution of the United States forbids a State from depriving any person of property without due process of law. It is respectfully submitted to the Court that the granting of a summary judgment by the trial court to the defendant in the original case on only nine (9) days notice to the opposite party where the T.R.C.P. require ten (10) days notice to the opposite party, made such summary judgment void. In *Garcia* v. *Parr*, 316 S.W. 2d 396; and in *Gardner* v. *Martin, et al*, 345 S.W. 2d 274, the Supreme Court of Texas held that in order for a moving party to be granted a summary judgment, all of the requirements prerequisite to obtaining same must be strictly complied with.

As all of the requirements prerequisite to obtaining the summary judgment were not strictly complied with, and as the opposite party had not been given ten (10) days notice of the motion for summary judgment as required by Texas Rules of Civil Procedure, Rule 166-A, the motion was not ripe for hearing, and the trial court committed fundamental error in granting the summary judgment.

Appellate courts can consider and determine whether the error made by the trial court will be considered as fundamental error, and if the error was fundamental error, such error can be set aside by any appellate court.

In *McCauley* v. *Consolidated Underwriters,* (1957) 304 S.W. 2d 265, 266, the Supreme Court of Texas said, "When the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter, the error will also be regarded as fundamental."

2. In *Holland* v. *Foley Brothers Dry Goods Company,* 324 S.W. 2d 430, 432 (Application for writ of error refused by Supreme Court of Texas), the Court of Civil Appeals stated on page 432, "Hearing was actually had on the 27th, but no decision was made. No decision having been made on the 27th, the motion for new trial was overruled by operation of law at the expiration of that day."

The attorneys for the appellees in the *Holland* v. *Foley Brothers Dry Goods Company* case, and the case was decided in favor of the appellees, was the law firm of Baker, Botts, Andrews and Shepherd.

In the prior case of *Clara L. Washington* v. *Golden State Mutual Life Insurance Company,* wherein the trial court granted a motion for summary judgment to the defendant on only nine (9) days notice of such motion to the opposite party, the attorneys for the defendant, Golden State Mutual Life Insurance Company, were Baker, Botts, Shepherd & Coates.

By applying the rule that decided the case in *Holland* v. *Foley Brothers Dry Goods Company,* 324 S.W. 2d 430 to the prior case of *Clara L. Washington* v. *Golden State Mutual Life Insurance Company,* 405 S.W. 2d 856, 408 S.W. 2d 227, it then appears that the case would have been decided in

favor of Clara L. Washington, and against the appellee and respondent represented by the law firm of Baker, Botts, Shepherd & Coates.

Since the rule announced in the case of *Holland* v. *Foley Brothers Dry Goods Company*, 324 S.W. 2d 430, was not followed in *Clara L. Washington* v. *Golden State Mutual Life Insurance Company*, 405 S.W. 2d 856, 408 S.W. 2d 227, and another rule from another case was followed, thus enabling the case to be decided in favor of the appellee and respondent represented by Baker, Botts, Shepherd & Coates (and in the request for a commission to take deposition upon written interrogatories (Tr. 25), Interrogatories 15, 16, 17, and 18), the questions there were asked to find out if the law firm of Baker, Botts, Shepherd & Coates was the same law firm that represented both appellees in the above cases, and whether the said law firm was a large law firm. It appears that a question is presented here as to whether the State of Texas through its state courts has denied to the petitioner in the prior case and in the instant case, the equal protection of the laws under Section 1, of the Fourteenth Amendment to the Constitution of the United States.

3. As the appellate courts of Texas held in *Washington* v. *Golden State Mutual Life Insurance Company*, 405 S.W. 2d 856, and in 408 S.W. 2d 227, that their court lacked jurisdiction because the appeal bond was filed late, one day late (Tr. 6). So, it is respectfully submitted to the Court that the trial court lacked jurisdiction of the subject matter in the prior case of *Washington* v. *Golden State Mutual Life Insurance Company*, on appeal reported in 405 S.W. 2d 856, and in 408 S.W. 2d 227, because the summary judgment was granted to the defendant on only nine (9) days notice to the opposite party, and one day prior to the time that the hearing of the motion for summary judg-

ment was ripe for hearing. (Tr. 2-9; 40-45) And therefore the trial court committed fundamental error, and due process of law and equal protection of the laws has been denied to the petitioner under Section 1, of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, petitioner prays that the Supreme Court of the United States grant this petition for a Writ of Certiorari, and petitioner further prays for costs of court in all state courts and in the Supreme Court of the United States.

Respectfully submitted,

.....

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Affirmed, and Opinion filed December 11, 1968.

APPENDIX

No. 185

CLARA L. WASHINGTON,

Appellant,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Appellee.

APPEAL FROM DISTRICT COURT OF HARRIS COUNTY

Appellant, Clara L. Washington, filed in the District Court of Harris County a petition for bill of review of a summary judgment rendered on February 24, 1966 by the trial court in a suit on a life insurance policy. Suit for bill of review was filed on January 29, 1968, and on April 30, 1968, appellee, Golden State Mutual Life Insurance Company, filed motion for summary judgment. The trial court granted appellee's motion for summary judgment on June 3, 1968 and denied Mrs. Washington, appellant, any and all relief. The appeal is from the trial court's summary judgment in the suit seeking bill of review.

This case involves a prior suit filed by Clara L. Washington against Golden State Mutual Life Insurance Company on August 19, 1964. See Washington v. Golden State Mutual Life Ins. Co., 405 S.W.2d 856, (Tex. Civ. App.), err. ref. per curiam, 408 S.W.2d 277, (Tex. Sup. 1966), cert. denied, 386 U.S. 1007, rehearing denied, 387 U.S. 938 (1967). In the prior case the same defendant moved for summary judgment, and on January 31, 1966, the trial judge considered affidavits and argument of counsel on the merits and announced that it would grant the motion. Up to this

time appellant had not raised any objection to the judge's proceeding with the hearing. However, later the same day appellant filed a motion in which she claimed that the judge should not have proceeded with the hearing on appellee's motion for summary judgment because she had not had ten days notice of hearing provided for by the Texas Rules of Civil Procedure, and that summary judgment was improper as a matter of substantive law. On February 24, 1966, judgment that appellant take nothing by reason of her suit against appellee was signed and entered, and appellant attempted to perfect an appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas.

Appellee moved the Court of Civil Appeals to dismiss the appeal for want of jurisdiction because of the alleged late filing of appellant's appeal bond. On July 7, 1966, the First Court of Civil Appeals filed a written opinion holding that it had acquired no jurisdiction because of the late filing of appellant's appeal bond and ordering the appeal dismissed for want of jurisdiction. Washington v. Golden State Mutual Life Ins. Co., 405 S.W.2d 856, (Tex. Civ. App.). Mrs. Washington, the appellant, then applied to the Supreme Court of Texas for a writ of error, and on November 9, 1966 that Court filed a written opinion approving the opinion and the holding of the Court of Civil Appeals and refusing the application for writ of error. Washington v. Golden State Mutual Life Ins. Co., 408 S.W.2d 227, (Tex. Sup. Ct.). Appellant unsuccessfully sought review by the United States Supreme Court.

In the present suit which seeks bill of review appellant set out the original petition filed August 19, 1964 and, in effect, reargued the merits of the prior appeal and set out the history of the prior case. Appellee, as above stated, moved for summary judgment, asserting that appellant's

failure to perfect an appeal from the judgment of February 24, 1966 defeated her right to a bill of review.

Appellant here contends that the trial court erred in rendering summary judgment because there was on file affidavits to show genuine issues of fact; in not hearing the entire controversy in one proceeding and determining it on its merits; in denying request of appellant for commission to take depositions; and that the trial court erred in the prior suit because appellant was allowed only nine days notice of appellee's motion for summary judgment, which rendered such prior judgment void and invalid by reason of Rule 166-A, T.R.C.P., and the due process and equal protection clauses of the Texas and United States Constitutions. Further contention is made that the trial court erred in failing to allow bills of exception, though a summary judgment was involved.

The affidavits on file and the interrogatories denied by the trial court were directed generally at matters which occurred in the prior case, and they could have had no relevance to the controlling point here. The interrogatories were directed at the trial judge and one of the attorneys for appellee, and none of them dealt with fraud, accident or wrongful act of appellee unmixed with any fault or negligence on the part of appellant, particularly in connection with appellant's failure to perfect her appeal in the prior case.

As has often been stated by the courts, before a litigant can successfully set aside a final judgment, he must allege and prove, within the time allowed, a meritorious cause of action or defense to the cause of action alleged to support the judgment, *and* which he was prevented from making by extrinsic fraud, accident or wrongful act of the opposite party, *and* unmixed with any fraud or negligence on his own part. French v. Brown, 424 S.W.2d 893, (Tex.

Sup.); Hanks v. Rosser, 378 S.W.2d 31, (Tex. Sup.); Alexander v. Hagedorn, 226 S.W. 2d 996, (Tex. Sup.); Trinity River Authority of Texas v. McMurrey, 411 S.W.2d 422, 425, (Tex. Civ. App.), writ ref., n.r.e.; Johnson v. Potter, 384 S.W. 2d 747, (Tex. Civfl App.), no writ hist.; 34 Tex. Jur. 2d, Sec. 205, p. 48. The relief afforded by bill of review must be for sufficient cause under Rule 329b (5) of the Texas Rules of Civil Procedure.

As the court stated in Birge v. Conwell, 105 S.W.2d 407, 408-409, (Tex. Civ. App.), writ ref.:

> "The bill of review is an equitable remedy and cannot be used to take the place of a motion for new trial, appeal, or writ of error. It cannot be so used during the term of the court when the original case was tried, nor can it be so used after the term has expired, if either of those expedients were available during the term at which the judgment was rendered, unless it be shown that the complainant had a good defense which was prevented by fraud, accident, or the wrongful acts of his adversary. It has never been the law that one who is negligent in the matter of filing and urging a motion for new trial or in perfecting an appeal or writ of error may avoid the consequences through the medium of a bill of review."

See also, Smith v. Ferrell, 44 S.W.2d 962, (Tex. Comm. App.), opinion approved; Lynn v. Hanna, 296 S.W.2d 280, (Tex. Sup.); 34 Tex. Jur. 2d, Sec. 230, p. 101 et seq., and cases there cited.

Appellants' principal contention is that she was not allowed ten days notice as provided by the Texas Rules of Civil Procedure, Rule 166-A, and that the trial court in the prior suit granted summary judgment after the expiration of nine days. But the prior final judgment was not thereby rendered void, although it may have been erroneous, if the court had jurisdiction of the parties, the sub-

ject matter and the power to render the judgment. French v. Brown, supra. It is not the purpose of a bill of review to relitigate issues decided in a former case whether the court committed error or not unless the prior judgment can be said to be void. We hold that the prior judgment was not void.

Since this is a summary judgment proceeding we have kept in mind the rule that the burden of proof lies with appellee in such cases. Great American Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47, (Tex. Sup.). All doubts as to the existence of a genuine issue as to a material fact are resolved against the movant. But the facts and admissions show conclusively, and it is undisputed, that the failure of appellant to avail herself of the remedy of appeal of the judgment of February 24, 1966 can be laid to nobody other than appellant. Her failure to perfect the appeal is not unmixed with fault or negligence on her part, and the record is clear in this respect.

A summary judgment may be granted with or without supporting affidavits in a case of this kind. Rule 166-A, T.R.C.P. There can be no material controversy when exhaustion of the legal remedy of appeal has failed under these circumstances, and when such facts are plain from the record. Omissions of this nature are occasionally made by the best of lawyers, but we are powerless to grant relief.

We have examined the entire record carefully, and we can find no error. Appellant's constitutional rights have not been violated.

The judgment of the trial court is affirmed.

/s/ JOHN M. BARRON
Associate Justice

Judgment rendered, and Opinion
filed December 11, 1968.

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IN THE

Supreme Court of the United States

October Term 1969

No. 348

CLARA L. WASHINGTON,
Petitioner

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals (App. of Petition) is reported at 436 S.W.2d 554. The Texas Supreme Court without written opinion approved the holding of the Court of Civil Appeals, refusing the application of writ of error with the notation, writ refused, no reversable error.

JURISDICTION

If this Court had jurisdiction to review the judgment of the Texas Court of Civil Appeals it would have jurisdiction only under 28 U.S.C. § 1257(3). However, this Court has no jurisdiction because petitioner's application for writ of certiorari was not timely filed with this Court. Petitioner's motion for rehearing was denied by the Texas Supreme Court on April 16, 1969. Petitioner's application

for writ of certiorari was not filed with this Court until July 16, 1969, ninety-one (91) days later. Petitioner's failure to file his application within ninety (90) days of the judgment below as required by 28 U.S.C. § 2101(c) and Rule 22(3) of this Court deprives this Court of jurisdiction. *Rust Land & Lumber Co.* v. *Jackson*, 250 U.S. 71, 76 (1919)

QUESTION PRESENTED

Was the Texas Court of Civil Appeals correct in holding that, under the Texas decisions, petitioner is not entitled to relief by bill of review from the judgment of February 24, 1966?

STATEMENT

This case involves a prior suit on a policy of insurance in which respondent moved for summary judgment. (App. of Petition) On January 31, 1966, attorneys for petitioner and respondent appeared before the trial court for a hearing on respondent's motion. (App. of Petition) The trial court heard evidence in the form of affidavits and argument of counsel on the merits and announced that it would grant the motion. (App. of Petition) Up to this time petitioner had not raised any objection to the Court's proceeding with the hearing. (App. of Petition) However, later the same day petitioner filed a multi-headed motion in which she claimed that the Court should not have proceeded with the hearing on the respondent's motion for summary judgment because petitioner had not had the 10 days notice of hearing provided by the Texas Rules of Civil Procedure and that summary judgment was improper as a matter of substantive law. (App. of Petition) On February 24, 1966, judgment that the petitioner take nothing by reason of her suit against respondent was signed and entered, and petitioner then attempted to perfect an appeal to the Court

of Civil Appeals for the First Supreme Judicial District of Texas. (App. of Petition)

Respondent moved the Court of Civil Appeals to dismiss the appeal for want of jurisdiction because of late filing of petitioner's appeal bond. (App. of Petition) On July 7, 1966, the Court of Civil Appeals filed a written opinion holding that it had acquired no jurisdiction because of late filing of petitioner's appeal bond and ordering the appeal dismissed for lack of jurisdiction. *Washington* v. *Golden State Mutual Life Ins. Co.*, 405 S.W. 2d 856 (Tex. Civ. App. 1966). (App. of Petition)

Petitioner then applied to the Supreme Court of Texas for a writ of error and on November 9, 1966, that Court filed a written opinion approving the opinion and the holding of the Court of Civil Appeals in refusing the application for writ of error. *Washington* v. *Golden State Mutual Life Ins. Co.*, 408 S.W.2d 227 (Tex. 1966). Under Texas law this amounted to affirmance of the action of the Court of Civil Appeals in dismissing the appeal for lack of jurisdiction. The merits of the appeal again were not reached. (App. of Petition)

Petitioner then applied to this Court for writ of certiorari and on April 17, 1967, certiorari was denied. *Washington* v. *Golden State Mutual Life Ins.. Co.*, 386 U.S. 1007, rehearing denied, 387 U. S. 938 (1967).

On January 29, 1968 petitioner filed the present suit, seeking by means of bill of review to have the trial court set aside its judgment of February 24, 1966, that petitioner take nothing by reason of her suit against respondent. (App. of Petition) Respondent on April 30, 1968 again moved for summary judgment, and on June 3, 1968, the trial court granted respondent's motion for summary judgment, denying petitioner's request for bill of review. (App.

of Petition) Petitioner perfected an appeal to the Court of Civil Appeals for the Fourteenth Supreme Judicial District.

The Texas Court of Civil Appeals affirmed the judgment of the trial court, holding that petitioner's failure to perfect an appeal from the judgment of February 24, 1966 defeated her right to a bill of review. (App. of Petition)

Petitioner then applied to the Supreme Court of Texas for a writ of error. The Texas Supreme Court, without filing a written opinion, approved the holding of the Court of Civil Appeals, refusing the application for writ of error with the notation, writ refused, no reversable error.

On April 16, 1969, petitioner's motion for rehearing was overruled by the Texas Supreme Court and on July 16, 1969, the petition for writ of certiorari was filed in this Court.

REASONS FOR NOT GRANTING THE WRIT

1. The case presents no substantial federal question. Petitioner in this suit asked the Texas courts by means of a petition for bill of review to start all over again and retry questions which had already been litigated in her prior suit. Petitioner does not object on constitutional grounds to the action taken by the Texas courts denying her petition for bill of review. Rather, petitioner asks this Court to correct an alleged error made by the trial judge in her prior suit against respondent. Petitioner claims that although her attorney participated in the hearing on respondent's motion for summary judgment in the prior suit conducted on January 31, 1966 without making any objection to the Court's proceeding, the trial court denied her due process and equal protection of the laws by proceeding when there was a claimed problem of

notice not raised by petitioner until after the hearing was concluded. Petitioner here reasserts this claim despite the fact that the Texas appellate courts could acquire no jurisdiction of her appeal from the district court judgment in the prior case because of the late filing of her appeal bond, and despite the fact that this Court has already once determined that it did not wish to review petitioner's claim. This is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous. *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308 (1902).

2. The judgment of the Texas Court of Civil Appeals rests on adequate and independent state grounds within the meaning of this Court's decision in *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945). The rule is well settled in Texas that in order to set aside a final judgment by means of a bill of review, the complaining party must allege and prove a meritorious cause of action which she was prevented from asserting by the extrensic fraud or wrongful act of the opposite party, unmixed with any fault or negligence on her own part, *E.g., French* v. *Brown,* 424 S.W. 2d 893, 895 (Tex. 1967); *Hanks* v. *Rosser,* 378 S.W. 2d 31, 34 (Tex. 1964); *Alexander* v. *Hagedorn,* 226 S.W. 2d 996, 998 (Tex. 1950). The Court of Civil Appeals affirmed the trial court's denial of petitioners' request for a bill of review, by applying the established state rule to the case and holding that petitioner's negligence in failing to perfect an appeal from the judgment of February 24, 1966, defeated her right to a bill of review.

Petitioner does not attack the Texas requirements for bill of review nor does she contend that Texas courts have failed to uniformly apply these requirements to all Texas litigants. Indeed the judgment of the Texas Court of Civil Appeals on the bill of review issue is not challenged by a petitioner at all. What petitioner does is ask this Court (for

the second time in a little more than two (2) years) to review the judgment of the Supreme Court of Texas on the same question of State law which petitioner sought to review on the prior application for writ of certiorari in this Court. Thus, petitioner, not only asks review in this Court on a question of State law, she also asks review of the same question of State law which this Court has declined to review before, and which by no stretch of the imagination could be before this Court on this application. What is before this Court on this application is a request that this Court review the unchallenged judgment of the Texas Court of Civil Appeals on the question of Texas requirements for bill of review actions. It is well settled that state courts speak with final authority on State law questions, *e.g.*, *Scripto, Inc. v. Carson,* 362 U.S. 207,210 (1960); *Murdock* v. *Memphis,* 87 U.S. (20 Wall.) 590 (1875), and that there can be no review if the state court has decided the case exclusively on some ground of State law and has never reached a federal question present in the case. *McCoy* v. *Shaw,* 277 U.S. 302, 303 (1928).

CONCLUSION

For these reasons the petition for writ of certiorari should not be granted.

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CLARA L. WASHINGTON, *Petitioner*

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GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY, *Respondent*

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

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No. 348

CLARA L. WASHINGTON, *Petitioner*

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GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY, *Respondent*

PETITION FOR REHEARING

TO THE HONORABLE SUPREME COURT:

Petitioner prays that the Court grant Rehearing of its Order of October 13, 1969, denying the Petition for a Writ of Certiorari to the Supreme Court of Texas.

REASONS FOR GRANTING REHEARING

1. Petitioner regrets that delivery of the Petition for a Writ of Certiorari was not made to the office of the Clerk of the Supreme Court or to the guard at the Supreme Court Building on July 15, 1969.

As a result of correspondence with the United States Post Office concerning the delivery of the certified mail bearing the Petition for a Writ of Certiorari, a reply letter was received from the Postmaster of the United States Post Office at Houston, Texas, dated September 2, 1969, which stated in part as follows:

"This acknowledges receipt of your letter of August 28, again on the subject of your Certified article No. 021829, mailed near mid-night, July 14, to the Supreme Court, Washington, D. C.

With the submission of the envelope in which this item was mailed, I wish to advise that I will again refer the entire file to the Postmaster, Washington, D. C. for possible further information concerning the delivery. Based on the stated time of mailing as well as the Houston, Texas postmark of a.m., July 15, it appears that the item was dispatched to Washington, D. C., at 6:15 a.m. via Eastern Airlines, flight 580, to arrive at 11:35 a.m."

The original of the letter is forwarded to the Clerk of the Supreme Court together with the 40 printed copies of this Petition for Rehearing.

2. Petitioner has sought Justice under law, and now that the petition for a writ of certiorari has been received one day late by the office of the Clerk of the Supreme Court, Petitioner does not question the Order of the Court in denying the petition for a writ of certiorari. But this incident highlights and brings into clear focus, one point, namely: Has equal dignity, has a fair interpretation been accorded by the State of Texas appellate courts to the Texas Rules of Civil Procedure in holding that the filing of the appeal bond one day late (according to their

computation) caused the appellate courts of Texas to lack jurisdiction; but failing to hold that the trial court lacked jurisdiction to grant the summary judgment to the movant against the opposite party, the petitioner, because the trial court decided the case one day prior to 10 days notice that is required to be given by the Texas Rules of Civil Procedure.

3. Respondent is in error in its Brief when it states under Reasons for not granting the writ, on page 4, that Petitioner does not object on constitutional grounds to the action taken by the Texas courts denying her petition for bill of review; for Petitioner in her petition for a writ of certiorari, under Reasons for granting the writ, states under Reason 2, page 6: "It appears that a question is presented here as to whether the State of Texas through its state courts has denied to the petitioner in the prior case and in the instant case, the equal protection of the laws under Section 1, of the Fourteenth Amendment to the Constitution of the United States.

Respondent is again in error in its Brief when it states that Petitioner did not attack the Texas requirements for bill of review, for such were attacked in the Brief of appellant and in Appellant's Motion for Rehearing in Court of Civil Appeals, and in Application for Writ of Error in Supreme Court of Texas, and in the Statement of Petitioner in her Petition for a Writ of Certiorari, under sub-paragraph 3.

4. It is noted that in the case cited by the respondent in its Brief in opposition, namely, *French v. Brown,* 424 S.W.2d 893, 895 (Tex. 1967); *Hanks v. Rosser,* 378 S.W.2d 31, 34 (Tex. 1964); *Alexander v. Hagedorn,* 226 S.W.2d 996, 998 (Tex. 1950); that in each of those cases

the Petitioners for a Bill of Review had a trial on the merits of the entire controversy which has been denied to the petitioner in the instant case. In the cases of *French v. Brown, Hanks v. Rosser,* and *Alexander v. Hagedorn,* there was no motion for summary judgment granted which would have denied the petitioners in those cases, for a Bill of Review, their day in Court and due process of law, and equal protection of the laws, but in the instant case of *Washington v. Golden State Mutual Life Insurance Company,* Petitioner in her Petition for a Bill of Review has had a second successive Motion for Summary Judgment awarded against her by the same movant, which summary judgment in her Petition for Bill of Review has prevented her from having her day in Court to prove the allegations made in her Petition for Bill of Review that she had a meritorious cause of action, which she was prevented from asserting by the extrinsic fraud or wrongful act of the opposite party, unmixed with any fault or negligence of the petitioner. The Texas courts never allowed the petitioner her day in court to prove the above allegations, and that therefore the petitioner was and has been denied due process of law and equal protection of the laws under Section 1, of the Fourteenth Amendment to the Constitution of the United States.

Respondent, who has played a part in the denial of the basic and fundamental right of due process of law and equal protection of the laws to the petitioner, which basic and fundamental right is vouchsafed to all citizens, describes the case, as "a classic case of a 'federal question' so absolutely devoid of merit as to be frivolous."

CONCLUSION

For the reasons set forth above, and in the petition for a writ of certiorari, it is respectfully petitioned that the Supreme Court give consideration to granting a rehearing, and that if it is deemed in accord with fair administration of justice in State courts of Texas and an according of due process of law and equal protection of the laws to afford this petitioner a rehearing, that upon rehearing a writ of certiorari issue to the Supreme Court of Texas.

ROBERT W. HAINSWORTH
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

ROBERT W. HAINSWORTH
Counsel for Petitioner